No. 391

IN THE

Supreme Court of the United States

October Term, 1942.

IN THE MATTER

OF

The Application of JOSEPH E. LEVINE,
a Bankrupt,
Petitioner-Appellant,

To Have a Certain Judgment in Favor of
JACK LEVINE,
Respondent,
Cancelled of Record.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York, for the County of Kings.

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INDEX.

CITATIONS.

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Petition for a Writ of Certiorari to the Supreme Court of the State of New York, for the County of Kings.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

JOSEPH E. LEVINE, your petitioner, respectfully represents:

1. By this petition opportunity is sought to review a final order of the Supreme Court of the State of New York, County of Kings, dated October 10, 1941, entered in the office of the Clerk of the County of Kings on the same day, which order was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department by an order dated March 23, 1942, from which order leave to appeal to the Court of Appeals of the State of New York was denied by said Court of Appeals by an order dated June 11th, 1942.

The order of the Supreme Court of the State of New York, County of Kings, dated October 10, 1941 ~~(fols. 13-18)~~ denied a motion made by your petitioner for an order

pursuant to Section 150 of the New York Debtor and Creditor Law to discharge and cancel of record a certain judgment in the sum of $14,149.00, docketed with the Clerk of the County of Kings on January 3rd, 1940, in favor of respondent.

2. These, briefly, are the facts:

Over a period of years your petitioner received substantial sums of money from respondent, a younger brother (Exhibit A, fol. 494), which he was to invest without any requirement that these funds be segregated in any special account or manner (Exhibit A, fol. 444). Unfortunately, with the advent of the severe depression in 1929-31, petitioner was unable to repay the money he owed respondent. At all times the money due respondent was deemed a mere debt and treated as such. Petitioner annually credited respondent with interest on the aggregate debt at the rate of six per centum per annum (Exhibit A, fol. 498).

Subsequently at the suggestion of respondent, petitioner willingly and in an evident desire to repay his obligation to his younger brother, executed and delivered to respondent a conditional confession of judgment (Exhibit A, fols. 657-660) based upon the moneys so received (Exhibit A, fol. 537). On January 3rd, 1940, without cause or justification and in open violation of the agreement under which the confession was delivered, the respondent entered judgment upon the said confession (Exhibit A, fols. 548-550).

Attempts were made for an amicable adjustment of the debt, but were unsuccessful.

On February 26th, 1940, petitioner filed a petition in bankruptcy in the United States District Court for the Eastern District of New York (Exhibit A, fol. 550). The said judgment was duly scheduled by your petitioner as one of his debts. Your petitioner received his discharge in bankruptcy on April 22nd, 1940 (Exhibit A, fol. 64).

Respondent, though duly notified, did not appear and made no objection in the bankruptcy proceedings to petitioner's discharge.

Subsequently respondent, by the service of a subpoena, commenced a proceeding supplementary to judgment to enforce its payment (Exhibit A, ~~fols. 77-79, 84-88~~). Petitioner there moved to vacate said process on the ground that the judgment upon which jurisdiction of the subject matter depended, had been discharged in bankruptcy (Exhibit A, ~~fols. 51-54~~). This motion, after a hearing and report by a Referee, was denied by the Justice of the New York Supreme Court presiding at Special Term, Part I. The learned Justice held that a trust had been violated by non-payment and the judgment consequently was not dischargeable in bankruptcy. The Court based its determination on its construction of subdivision 4, Section 17, Title 11, U. S. Code.

On appeal to the Appellate Division, the Special Term ruling was upheld on the entirely different ground that the petitioner had willfully injured respondent's property. This determination was based on the Court's interpretation of sub. 2, Section 17, Title 11, U. S. Code.

More than one year later petitioner commenced this proceeding to cancel the said judgment pursuant to Section 150 of the Debtor and Creditor Law of the State of New York.

In opposition to this motion respondent urged only one objection, that is, that the order on the prior motion to vacate the subpoena in supplementary proceedings was *res adjudicata* on the issue of dischargeability of the said judgment.

Question Presented.

The Appellate Division, in affirming the order denying petitioner's motion to vacate the subpoena in supplementary proceedings said in part:

> "The proof clearly shows that there was a wilfull and malicious conversion of the judgment-creditor's property by the judgment-debtor so that the judgment by confession entered for such conversion was not a debt dischargeable in bankruptcy under Subdivision 2 of Section 17 of the Bankruptcy Act * * *."

It is contended, and this honorable Court is respectfully requested to examine the record of the preceding motion (Exhibit A) for the sole purpose of ascertaining the veracity of the appellant's contention, that the opinion of the Appellate Division on the preceding motion to the effect that the appellant's conduct did result in willful and malicious injury to respondent's property was entirely without foundation or basis in fact. Not only that but whatever facts were then before the Court clearly demonstrated, that the appellant's conduct did not result in a willful and malicious injury to the respondent's property of such nature as to render the within application not dischargeable in bankruptcy.

The entire record, therefore, raises this question: Whether Subdivision 2 of Section 17 of the Bankruptcy Act, which prohibits the discharge of any obligation resulting from "willful and malicious" injury to the personal property of another is satisfied by proof of anything less than larceny or theft, deliberately and maliciously conceived and executed?

Such proof cannot be found in this record.

Reasons for Granting the Writ.

It is asserted in the accompanying brief that the decision in this case is inconsistent with the holding of this Court in *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328. Furthermore, *MacIntyre* v. *Kavanaugh*, 242 U. S. 138 is not inconsistent with that case and does not support the decision below.

But petitioner is not before this Court solely because he is personally aggrieved by the erroneous application of the Bankruptcy Act by the State Courts. The decision of the State Courts herein creates a conflict of authority as to whether mere failure to repay a debt constitutes a willful and malicious injury to property under Section 17, Subdivision 2 of the Bankruptcy Act. This Court ought exercise its jurisdiction to settle this conflict.

WHEREFORE, your petitioner prays that this Honorable Court review the final order of the New York Supreme Court denying his motion for cancellation of a judgment discharged in bankruptcy.

Dated: New York, N. Y., August 20, 1942.

JOSEPH E. LEVINE,
Petitioner.

STATE OF NEW YORK,
CITY OF NEW YORK, } ss.:
COUNTY OF NEW YORK.

JOSEPH E. LEVINE, being duly sworn, deposes and says that he is the petitioner in the within proceeding and that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JOSEPH E. LEVINE.

Sworn to before me this
20th day of August, 1942.

RUTH FLAX,
Notary Public,
Bronx County,
Bronx Co. Clk's No. 163, Reg. No. 153F44;
Certificates filed in
N. Y. Co. Clk's No. 870, Reg. No. 4F487;
Kings Co. Clk's No. 166, Reg. No. 4285;
Commission expires March 30, 1944.

IN THE

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Petitioner-Appellant,

To Have a Certain Judgment in Favor of JACK LEVINE,
Respondent,

Cancelled of Record.

Brief in Support of Petition for Certiorari.

Statement.

The essential facts are stated in the petition. The opinion of the Supreme Court of the State of New York in which the application to vacate and discharge the judgment is denied appears at page 20 of the record. The opinion of the Appellate Division of the Supreme Court on the motion to vacate the said subpoena appears at page 15 of this brief. Exhibit A, which is a part of the record herein is the record on appeal on the motion to vacate the subpoena in supplementary proceedings and contains (1) the decision referring the issues to an Official Referee (~~fols.~~

368, 369), (2) the report of the Official Referee (Exhibit A, fols. 748-755), (3) the decision confirming said report (Exhibit A, fols. 757-759), and (4) the order denying the motion to vacate the subpoena (Exhibit A, fols. 385-393).

Jurisdiction.

The order of the Court of Appeals denying leave to appeal was entered on June 11, 1942.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended.

POINT I.

Certiorari should be granted by the Supreme Court to review the order denying cancellation of the judgment discharged in bankruptcy. There was no willful and malicious injury to respondent's property within Subdivision 2 of Section 17 of the Bankruptcy Act as construed by this court.

The relevant portion of the Bankruptcy Act is Section 17, which provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (second) are liabilities * * * for willful and malicious injuries to the person or property of another * * *"

The material portion of Section 150 of the Debtor-Creditor Law of the State of New York provides:

> "At any time after one year has elapsed since a bankrupt was discharged from his debts, pursu-

ant to the acts of congress relating to bankruptcy, the bankrupt, his receiver, trustee or any other interested person or corporation, may apply, upon proof of the bankrupt's discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it therein, for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same, by marking on the docket thereof that the same is canceled and discharged by order of the court, giving the date of entry of the order of discharge."

This Court may examine the circumstances of this case to determine for itself whether there was a willful and malicious injury to respondent's property by petitioner. *Davis* v. *Aetna Acceptance Corp.*, 293 U. S. 328.

The record in this case is barren of any proof of a tortious injury to respondent's property (Exhibit A, ~~fols. 394-717~~). All that was proved was an inability to repay a debt conceived in and arising out of an admitted agreement to receive and invest money (Exhibit A, ~~fols. 494-512~~). There was no requirement that petitioner segregate respondent's money as received (Exhibit A, ~~fol. 444~~). Grievous and unfortunate, as it may have been, petitioner's default at most was a failure to repay a fraternal obligation, expressed in the terms of debtor-creditor (Exhibit A, ~~fols. 420, 634-635~~).

Such a failure to repay is not a willful and malicious injury to petitioner's property. Neither does the fact

that respondent may have in effect waived a right to sue in contract for money had and received and sued for a conversion transform the injury into one that is malicious and willful.

Maliciousness or willfulness are not essentials of the cause of action for conversion. Mere appropriation, no matter how conceived, of another's property is sufficient to constitute a tort. It must accordingly be shown that there are aggravated features of the conversion. *Davis* v. *Aetna Acceptance Co., supra.* It must be marked by the wantonness and *animo furandi* of a larceny. *McIntyre* v. *Kavanaugh,* 242 U. S. 138. Simple conversion without more does not taint the debt with non-dischargeability under Section 17, subdivision 2 of the Bankruptcy Act.

As to these simple principles this Court said in *Davis* v. *Aetna Acceptance Corp., supra,* at page 333:

> "The respondent contends that the petitioner was liable for a wilful and malicious injury to the property of another as the result of the sale and conversion of the car in his possession. There is no doubt that an act of conversion, if wilful and malicious, is an injury to property within the scope of this exception. Such a case was *McIntyre* v. *Kavanaugh,* 242 U. S. 138, 61 L. ed. 205, 37 S. Ct. 38, 38 Am. Bankr. Rep. 165, where the wrong was unexcused and wanton. But a wilful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without wilfulness or malice. *Boyce* v. *Brockway,* 31 N. Y. 490, 493; *Laverty* v. *Snethen,* 68 N. Y. 522, 527, 23 Am. Rep. 184; *Wood* v. *Fisk,* 215 N. Y. 233, 239, 109 N. E. 177, 35 Am. Bankr. Rep. 46; *Stanley* v. *Gaylord,* 1 Cush. 536, 550, 48

Am. Dec. 643; *Compau* v. *Bemis,* 35 Ill. App. 37; *Re De Lauro* (D. C.) 1 F. Supp. 678, 679, 20 Am. Bankr. Rep. (N. S.) 481. There may be an honest, but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a wilful and malicious one * * * The discharge will prevail as against a showing of conversion without aggravated features."

Prior to the decision in the instant case this had also been the interpretation and application of Section 17, subdivision 2 by the Courts of New York. *Ulner* v. *Doran,* 167 App. Div. 259, at pages 261-262, Appellate Division, First Department:

> "The merely constructive fraud and malice which is sometimes said to follow upon the fact of conversion is not sufficient to prevent the discharge of the indebtedness whether it has been reduced to judgment or not. (*Maxwell* v. *Martin,* 130 App. Div. 80; *Lewis* v. *Shaw,* 122 id. 96; Collier Bankruptcy [10th ed.] 387.) We think, therefore, that the judgment debt was discharged by the discharge in bankruptcy."

See also, *Johnston* v. *Bruckheimer,* 133 App. Div. 649, at page 653, Appellate Division, First Department:

> "In all of these cases the acts under consideration involved moral turpitude and under such circumstances it was not difficult to find malice, but the same cases pointed out that there are torts which would not be of such a nature as to involve malice, as, for instance, negligently running over a

person in the public streets, while intentionally riding down a particular person would, of course, be malicious and, therefore, come within the rule."

Enough has been shown by these citations to indicate the meaning of the phrase, "willful and malicious injury to property," when related to conversion as previously understood and applied in New York.

As those words are used in the Act they mean not a technical conversion, but conduct which involves moral turpitude and which is nothing less than larceny. The bankrupt who has been guilty of conversion and no more will be discharged of his obligation in the Bankruptcy Court. But if he has acted as a thief, the discharge avails him nothing. A demonstration that he has been guilty of conversion, but that his conduct is not that of a thief, will not bar his discharge. All of the cases can be rationalized and explained only in relation to this simple statement of the law. The case of *McIntyre* v. *Kavanaugh*, 242 U. S. 138, much relied upon below by the respondent, is consistent with this statement. The brokers in that case had accepted the deposit with themselves of securities valued at $25,000, against a loan application of their customer, McIntyre, in the sum of only $3,000. Within nine days they had secretly and evasively repledged three-fourths of all the stock and they had disposed of all of it within five weeks. As the Appellate Division (128 App. Div. 722) said of their conduct:

"In short, the acts disclosed constituted larceny."

In the statement of the case which was reviewed in the Court of Appeals of the State of New York, *Kavanaugh* v. *McIntyre*, 210 N. Y. 175, at page 176, there is this significant sentence:

> "Nothing further appears as to the nature of the account, but the Court refused to find that the securities were deposited on margin."

Again at page 182 that Court said:

> "It is very significant that the defendants against whom the judgment was rendered went on the witness stand but made no attempt to justify or excuse the acts of the firm. These facts show that the conversion of the stock and scrip was not merely technical nor committed in the assertion of a mistaken claim to the property. It was a wrongful act done intentionally without just cause or excuse, and constituted willful and malicious injury to the plaintiff's property as those words are used in section 17 of the Bankruptcy Law."

The opinion of this Court said in part:

> "To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptation of the words."

The counterpart of *McIntyre* v. *Kavanaugh* is *Brown* v. *Garey,* 267 N. Y. 167 (certiorari denied, 296 U. S. 615). There the defendant brokers without the shadow of right repledged securities which they had no authority to pledge, and shortly thereafter, falling into financial difficulties, were petitioned into bankruptcy and, of course, were unable to return the securities or their value, but there was absent from the case any showing of a guilty intention or of evasive conduct and a failure of proof that the partners in the brokerage firm actually intended to sell their customer's property. The Court of Appeals held that the debt was dischargeable. It said at page 171:

> "Giving the plaintiff the benefit of all inferences which may be drawn from the evidence, the most that can be said is that the conversion was the result of negligence. The burden which rested upon plaintiff (*Kreitlein* v. *Ferger*, 238 U. S. 21) to show that the defendants either directly or vicariously pledged plaintiff's stock intentionally, without just cause or excuse and knowing that it would necessarily cause him harm, has not been met."

In *Wood* v. *Fisk*, 215 N. Y. 233, the Court of Appeals held that the repledge by brokers of securities for a sum in excess of their authority to pledge, constituted conversion, but that nevertheless the resulting obligation was discharged by bankruptcy proceedings because there had been no proof of such aggravated circumstances as would permit of the conclusion that the conduct of the defendants was larcenous. The Court said at page 240:

> "We held in *Kavanaugh* v. *McIntyre* (128 App. Div. 722; 210 N. Y. 175) and again in *Andrews* v. *Dresser* (214 N. Y. 671) that there may be acts of conversion so wanton as to be included in that exception. Those were cases where the charge of conversion was equivalent to a charge of larceny. We think the misuse of the plaintiff's securities is not to be classified as a willful and malicious injury within the meaning of that statute (*Johnston* v. *Bruckheimer*, 133 App. Div. 649; *Allen* v. *Fromme*, 195 N. Y. 404, 407). The repledge unlike a sale, left the general property in the plaintiff; it gave rise, until followed by bankruptcy, to nominal damages only; and so far as there was any willful conversion, it was, therefore, partial and technical rather than absolute and malicious."

And it must always be remembered that presumptively an obligation scheduled in bankruptcy petitions has been discharged and that the burden of proof is on the objec-

tor to demonstrate the contrary. *Kreitlein* v. *Ferger*, 238 U. S. 21; *Brown* v. *Garey*, 267 N. Y. 167. There was no attempt to assume that burden by the respondent herein, nor could such an effort be made. There was no misconduct by the debtor in receipt of the moneys from the creditor; there was no evasiveness by him in the handling of those moneys. On the contrary, there was always a complete revelation by the debtor to the creditor of the debtor's dealings with the moneys which he had received from him (Exhibit A, ~~fols. 414-426~~). There is, therefore, no basis here for saying that the conduct of this appellant was tantamount to the commission of the crime of larceny and yet the Appellate Division held by its opinion that the conduct of the appellant resulted in willful and malicious injury to property. That holding is justified only if that Court could condemn his conduct as that of a thief. It is respectfully submitted that it could not and should not have done so on the record and that, therefore, the decision denying the cancellation of the judgment was erroneously made and is in conflict with the law as declared by this Court.

Since the appellant's debt was discharged, unless his conduct in incurring the obligation or in failing to repay it was tantamount to larceny, and since there is no showing of even bad faith on his part in assuming the obligation in the first instance, and nothing worse than misfortune in his inability to repay, the determination by the State Courts was erroneously made, and appellant ought be permitted to appeal to this Court so that it may exercise its power finally to conform the law of New York with that declared by this Court.

Respectfully submitted,

WEGMAN & CLIMENKO,
Attorneys for Petitioner-Appellant.

JESSE CLIMENKO,
Of Counsel.

Opinion of Appellate Division.

N. Y. Law Journal

Levine v. *Levine*

May 6, 1941.

By Lazansky, Carswell, Johnston, Adel & Taylor

Matter of Levine, res. (*Levine, ap.*)—In proceedings supplementary to judgment, the judgment-debtor moved to vacate a subpoena served upon him for his examination upon the ground that the obligation referred to in the subpoena had been discharged in bankruptcy and for an order adjudging that the obligation referred to in the subpoena was discharged in bankruptcy. The holding by Special Term, in confirming the report of the official referee was that there was a trust relationship between the debtor and the creditor within the meaning of section 17, subdivision 4, of the Bankruptcy Act. That subdivision applies only to express trusts (*Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328, at p. 333). The proof clearly shows that there was a willful and malicious conversion of the judgment-creditor's property by the judgment-debtor so that the judgment by confession entered for such conversion was not a debt dischargeable in bankruptcy under subdivision 2 of section 17 of the Bankruptcy Act, by which are except "Liabilities * * * for willful and malicious injuries to the * * * property of another * * *." Order of April 5, 1941, resettling order of February 18, 1941, confirming report of official referee, &c., affirmed with $10 costs and disbursements; examination of the judgment-debtor and of Ashenfelter & Morrow, by George C. Morrow, to proceed on five days' notice.

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Cancelled of Record.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX

CITATIONS.

Cases:

Statutes:

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement

The order which is sought to be reviewed was made in the Supreme Court of the State of New York, County of Kings, on October 10th, 1941. It was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, on March 23rd, 1942, and the Court of Appeals of the State of New York denied leave to appeal by an order dated June 11th, 1942 (pgs. 1, 14, 15).

The motion which resulted in the order before re-

ferred to, was made pursuant to Section 150 of the Debtor and Creditor Law of the State of New York, to discharge and cancel of record a certain judgment in the sum of $14,149.00 docketed with the Clerk of the County of Kings on January 3rd, 1940 in favor of the respondent (pg. 1).

Statement of the Case

The statement of facts contained in the petition for a writ of certiorari is contrary to the decision of Hon. George A. Furman, Official Referee, made on January 14th, 1941 (Exhibit A, pgs. 250-252), the opinion of Mr. Justice Nova made on February 13th, 1941 (Exhibit A, pg. 253) and the opinion of the Appellate Division, Second Department, rendered on May 6th, 1941 (Exhibit B).

The facts are these: On January 3rd, 1940, a confession of judgment dated December 18th, 1937 in the sum of $14,149.00 made by the petitioner in favor of the respondent, was docketed against petitioner in the office of the Clerk of the County of Kings. After the service of subpoenas for the examination of the petitioner and his employers, the former filed a petition in bankruptcy in the United States District Court, for the Eastern District of New York. On April 22nd, 1940 he was discharged (pg. 8).

A renewed attempt to examine the petitioner and his employers resulted in a motion made by petitioner to vacate the subpoena and for an adjudication that the obligation referred to in the subpoena had been discharged by the proceedings under the Bankruptcy Act. This motion came on before Mr. Justice Nova at Special Term, Part I of the Supreme Court of the State of New York, County of Kings, who (in order to decide whether the obligation represented by the judgment was dischargeable in nature) referred the question of the relationship between the parties, namely, whether

it was that of debtor and creditor, bailor and bailee, or trustee and cestui que trust, to an Official Referee for hearing and report. After extensive hearings were held affording to both parties a full and complete right of direct and cross-examination, the late Official Referee Furman made a report on January 14th, 1941 in favor of the respondent. This report was later confirmed by Mr. Justice Nova and after an appeal taken by the petitioner, on May 6th, 1941, the Appellate Division, Second Department, unanimously affirmed the determination of Mr. Justice Nova (pgs. 8-9).

Subsequent to all of the foregoing, the petitioner moved for an order pursuant to Section 150 of the Debtor and Creditor Law, to discharge and cancel the judgment of record. This is the motion which was denied by Mr. Justice Lewis, which denial was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Department, and review of which was refused by the Court of Appeals of the Supreme Court of the State of New York, and which underlies the instant petition (pgs. 2-6).

The late Hon. George A. Furman, was the trier of facts and he found that the relationship between the parties was that of trustee and cestui que trust. This view was confirmed by Mr. Justice Nova on motion to confirm the report of the said Referee. When the appeal was taken to the Appellate Division, that Court said:

> "The proof clearly shows that there was a wilful and malicious conversion of the judgment creditor's property by the judgment debtor so that the judgment, by confession entered for such conversion, was not a debt dischargeable in bankruptcy under Subdivision 2 of Section 17 of the Bankruptcy Act, by which are excepted 'liabil-

> ities' * * * for wilful and malicious injuries to the * * * property of another" (pg. 10).

When the application underlying the instant petition was made in the Supreme Court of the State of New York, it was argued that the earlier determination which had been affirmed by the Appellate Division on the facts and on the law, was *res judicata,* and that consequently the remedy under Section 150 of the Debtor and Creditor Law of the State of New York was not available to the petitioner. This view was adopted by Mr. Justice Lewis. The learned Justice said:

> "These earlier proceedings conclusively established the non-dischargeability of the debt in question, and that issue may not be relitigated here by motion made under Section 150 of the Debtor and Creditor Law. In deciding the motion to vacate the subpoena, it was necessary to determine whether the debt had already been discharged. That issue was presented to the Court by both parties. The opinions of the Referee, of Special Term, and of the Appellate Division clearly indicate that precisely such issue was considered and determined. The petitioner has had a full hearing on the matter sought to be adjudicated herein and is bound thereby" (pgs. 11-13).

Reasons for Denial of a Writ of Certiorari

As a preliminary to the statement of the reasons why a writ of certiorari should be denied, it is observable that two reasons are assigned in the petition for the granting of the writ. They are: (a) that the decision in this case is inconsistent with the holding of this Court in *Davis* v. *Aetna Acceptance Co.,* 293 U. S. 328,

and (b) that the decision of the state court herein creates a conflict of authority as to whether mere failure to repay a debt constitutes a wilful and malicious injury to property under Section 17, subdivision 2 of the Bankruptcy Act.

1. The record shows that the decision in question is based upon the ground of *res judicata* and upon an interpretation of a local law, namely, Section 150 of the Debtor and Creditor Law of the State of New York. No federal question was considered or decided.

2. Even if it can be said that a federal question was involved here, the *res judicata* ground is alone sufficient to sustain the decision. Moreover, it does not appear affirmatively that the court could not have decided as it did unless it had decided a federal question.

3. Even if it can be said that a federal question was involved, no showing has been made either that the state court has decided a federal question of substance not theretofore determined by this Court or that it was decided in a way probably not in accord with applicable decisions of this Court.

4. Implicit in the reasons assigned for the granting of the writ, is a requirement that this Court investigate the facts and adopt a view thereof contrary to that taken by the late Hon. George A. Furman, Mr. Justice Nova, and the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

ARGUMENT

Summary of the Argument

POINT I—The petition for a writ of certiorari should be denied because the decision was based upon the grounds of *res judicata* and interpretation of a local law. It does not involve a federal question.

POINT II—If it should be held that a federal question was involved, this Court should, nevertheless, refuse to grant the writ because the record shows other non-federal grounds, namely, *res judicata,* sufficient to sustain the decision.

POINT III—Since it does not appear that (a) the state court of necessity could not have decided as it did unless it decided a federal question, or (b) a federal question was actually determined, the petition should be denied.

POINT IV—The determination of the Appellate Division of the State of New York, Second Judicial Department, on the earlier proceeding which was held to be binding upon the court which decided the motion underlying the instant petition, was based upon decisions theretofore determined and settled by this Court, and was made in strict accordance therewith.

POINT V—Since the question projected requires an investigation of the facts and a new view thereof, the petition should be denied.

POINT VI—The petition for a writ of certiorari should be denied.

POINT I.

The petition for a writ of certiorari should be denied because the decision was based upon the grounds of res judicata and interpretation of a local law. It does not involve a Federal question.

It is settled law that on an application of this kind, a federal question must be involved. It is equally well settled that it is not the function of this Court to decide local questions. Who may sue under a state statute, and when, and under what circumstances, are questions for the exclusive determination of the state tribunal whose judgment thereon is not subject to review by this Court.

In this case, the record shows that the application was made under Section 150 of the Debtor and Creditor Law of the State of New York and that the court held that the petitioner was not entitled to its benefits because a previous decision had determined the matter adversely to him (pgs. 11-13).

In *Chouteau* v. *Gibson*, 111 U. S. 201, the claim of *res judicata* was made. The court held that this was a question of general law and not a federal question. The Court said:

> "Such being the case, it is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which decision of the State Court is not reviewable here. The federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way. The question

presented by the defense was not whether a federal right had been properly denied by a former judgment, but whether the right had been once judicially determined so as to become *res judicata* between the parties."

The construction and effect of a prior decree of a state court, and how far it bound the state, and whether or not it bound parties subsequently coming in, are matters of state procedure, the rulings on which cannot present any question which will sustain a writ of error from the Federal Supreme Court to a state court. (*King* v. *State of West Virginia,* 216 U. S. 92, 54 Law. Ed. 396):

> "The transcript of the judgment presented to us, which contains the proceedings of the court below, does not present any federal question which authorizes us to review the decision of the state court. Whether or not the adjudication upon the first bonds of the same series could be pleaded as an estoppel of the proceeding for the fundability of other bonds of the same series, is not a federal question". (*John I. Adams & Co.* v. *The Board of Liquidation of The State of Louisiana,* 144 U. S. 651).
>
> "In the present case, the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action. That was a question of general law only, in no wise depending

> upon the Constitution, treaties or statutes of the United States." (*The City and County of San Francisco* v. *Itsell*, 133 U. S. 65.)

In *Kenney* v. *Craven*, 216 U. S. 92, 54 Law. Ed. 122, this Court failed to find jurisdiction in a situation where the judgment in the court below was solely based upon the operation and effect of a prior judgment between the parties or their privies. The Court said:

> "Indeed, the fallacy underlying all the contentions urged in favor of our jurisdiction, and the arguments of inconvenience by which those propositions are sought to be maintained, in their ultimate conception, involve the assumption either that the correctness of the state decree, which was held to be *res judicata*, is open for consideration on this record, or assail the conclusively settled doctrine that the scope and effect of a state judgment is peculiarly a question of state law and therefore a decision relating only to such subject involves no federal question."

See also:

> *The Northern Pacific R. R. Company* v. *Ellis*, 144 U. S. 458.

The uniform determination of this Court to deny applications for writs where they involve considerations of local law, is exemplified by the decision of this Court in *Supreme Lodge K. P.* v. *Meyer*, 265 U. S. 30, 44 Sup. Ct. Rep. 432, 433, where the Court said:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the

meaning of the state legislation, as though such meaning had been specifically expressed therein."

In *United Gas Public Service Co.* v. *State of Texas*, 58 Sup. Ct. Rep. 483, 491, 303 U. S. 123, 139, the Court said:

"With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court and on appeal. It is not our function, in reviewing a judgment of the state court to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements."

In *De Saussure* v. *Gaillard*, 127 U. S. 216, the Court said:

"That question is not a federal question; it does not arise under the Constitution of the United States, or under any law or treaty made in pursuance thereof. It is not a question, therefore, which, under this writ of error we have a right to review. We are not authorized to inquire into the grounds and reasons upon which the supreme court proceeded in its construction of that statute. It is a state statute conferring rights upon suitors choosing to avail themselves of its provisions upon certain conditions in certain cases. Who may sue under it, and when, and under what circumstances,

> are questions for the exclusive determination of the state tribunals, whose judgment thereon is not subject to review by this court."

POINT II.

If it should be held that a federal question was involved, this Court should, nevertheless, refuse to grant the writ because the record shows other non-federal grounds, namely, res judicata, sufficient to sustain the decision.

Where the record discloses that the judgment of a state court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to sustain the judgment, this Court will not take jurisdiction to review such judgment and will dismiss a writ of error for that purpose.

In *People of the State of New York, etc.* v. *Atwell*, 261 U. S. 590, 43 Sup. Ct. Rep. 410, the Court said:

> "It is settled law, that where the record discloses that the judgment of a state court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to sustain the judgment, this Court will not take jurisdiction to review such judgment and will dismiss a writ of error brought for that purpose."

In this matter it cannot be argued that the decision

of Mr. Justice Lewis involved a consideration of a federal question. But even if it did, the fact that he rendered his decision upon the ground of *res judicata* would bring it within the ambit of the authorities which sustain the statement made in the preceding paragraph.

Accord:

> "It is settled by numerous decisions of this court that where the decision in the state court adverse to the plaintiff in error proceeds upon two independent grounds, one of which, not involving a Federal question, is sufficient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed, according to circumstances." (*Southern Pacific Company* v. *Schuyler*, 33 Sup. Ct. Rep. 277, 280, 227 U. S. 601.)

> "An analogous situation is found in cases where the jurisdiction of this Court has been invoked on writs of error appeals from judgments of state courts, and it appears that, notwithstanding the existence of a federal question, and its consideration and determination by the state court, the judgment rests upon a non-federal ground adequate to support it and hence, would not be affected by a decision by this Court of the federal question. In such cases, we refuse review." (*United States* v. *Hastings*, 296 U. S. 188, 193, 56 Sup. Ct. Rep. 218, 220.)

In *Lynch, et al* v. *People of New York, et al*, 293 U. S. 52, 54, 55 Sup. Ct. Rep. 16, 17, this Court said:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based,

and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

POINT III.

Since it does not appear that (a) the state court of necessity could not have decided as it did unless it decided a federal question or (b) a federal question was actually determined, the petition should be denied.

It has been held repeatedly in this Court that in reviewing a decision of a state court, it is essential to its jurisdiction, that it appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it.

In *Southwestern Bell Tel. Co.* v. *State of Oklahoma*, 303 U. S. 206, 212, 58 Sup. Ct. Rep. 528, 530, the Court said:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a state, that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the

federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

In *Chouteau* v. *Gibson,* 111 U. S. 201, the Court said:

> "From the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

POINT IV.

The determination of the Appellate Division of the State of New York, Second Judicial Department, on the earlier proceeding which was held to be binding upon the court which decided the motion underlying the instant petition, involved decisions theretofore determined and settled by this Court, and was made in strict accordance therewith.

Subdivision 5 of Rule 38 of the Rules of the Supreme Court, contains the following statement: "A review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion indicate the character of reasons which

will be considered: (a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

If this Court should be disposed to examine the record of the earlier proceedings which were held to be binding on the court on the motion which underlies this petition, it will find that the decision is based upon a finding of fact that the conduct of the petitioner constituted wilful and malicious injury to the property of the respondent. On the basis of such a finding of fact, it was held, in accordance with innumerable decisions of this Court, that the judgment in question was not dischargeable. The various exhibits submitted to this Court include the legal briefs submitted to the Appellate Division, Second Judicial Department, and they show beyond doubt that the settled authorities justify and sanction the decision.

It is respectfully ventured that a recital and analysis of each of the decisions which support the ruling of the court on the earlier proceeding, would unduly burden the Court and its attention is respectfully directed to Exhibit C, being the Points submitted by the petitioner to the Appellate Division, Second Judicial Department.

POINT V.

Since the question projected requires an investigation of the facts and a new view thereof, the petition should be denied.

It is clear that this Court will not grant certiorari to review evidence and discuss specific facts. Moreover, it is not the province of the Federal Supreme Court to weigh conflicting evidence where the record shows testimony supporting the verdict.

> "We do not grant a certiorari to review evidence and discuss specific facts." (*United States* v. *Johnston*, 268 U. S. 220, 227, 45 Sup. Ct. Rep. 496, 497.)

See also:

> *Great Northern Railway Co.* v. *Donoldson*, 246 U. S. 121, 38 Sup. Ct. Rep. 230.

In the supporting petition, it is asserted that the decision of the state courts creates a conflict of authority as to whether mere failure to repay a debt constitutes a wilful and malicious injury to property. This naturally assumes that the record here shows "mere failure to repay a debt", and this is an assumption which the petitioner indulges without any warrant whatever.

To the precise contrary, the opinions of the late Referee, Hon. George A. Furman, of Mr. Justice Nova (Exhibit A, pgs. 250-252), and of the Appellate Division, Second Judicial Department (Exhibit B) each of them

show that there was a conversion of property belonging to the respondent.

Since this Court will not review evidence and discuss specific facts, the only assigned basis for the granting of the writ is eliminated and it follows from this that the writ should be denied.

POINT VI.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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